

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

NYFFELER V. NYFFELER

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

JILL LEANNE NYFFELER, NOW KNOWN AS JILL LEANNE ZEHR, APPELLANT,

V.

BRANDON PAUL NYFFELER, APPELLEE.

Filed August 7, 2012. No. A-11-936.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge.
Affirmed.

Jeff T. Courtney, P.C., L.L.O., for appellant.

Benjamin M. Belmont and Jessica L. Finkle, of Brodkey, Cuddigan, Peebles & Belmont,
L.L.P., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

SIEVERS, Judge.

I. INTRODUCTION

Jill Leanne Nyffeler, now known as Jill Leanne Zehr, appeals from an order of the district court for Douglas County denying her application to remove the parties' children to Iowa. We affirm.

II. BACKGROUND

Jill and Brandon Paul Nyffeler were married in 1998 and were divorced pursuant to a decree of dissolution filed on February 12, 2007. Two children were born during the marriage, Ryan Nyffeler, born in December 2000, and Kaitlyn Nyffeler, born in May 2003. In the decree, the district court awarded custody of Ryan and Kaitlyn to Jill, subject to Brandon's rights to reasonable and liberal parenting time. Brandon was ordered to pay child support in the amount of \$1,191.21 per month.

Subsequent to the dissolution of the parties' marriage, Jill began a relationship with Luke Zehr. When they began their relationship, Luke worked construction in Omaha, Nebraska. In August 2009, Luke moved to Iowa to work for Nutrishop, a vitamin and health supplement store owned by his friend. Luke and Jill were engaged in November 2009 and were married on August 20, 2010.

On March 11, 2010, Jill filed an application to remove the children from Nebraska so that she and the children could move to Iowa to reside with Luke. On March 25, Brandon answered, denying that Jill had a legitimate basis for removal and denying that removal was in the best interests of the children. Brandon counterclaimed for a change of custody to him and an order directing Jill to pay child support. On April 13, Jill replied, denying the allegations in Brandon's answer and counterclaim.

Trial was held on April 15, 2011. At trial, both Jill and Brandon presented evidence which they assert supported their respective positions on removal and custody.

Jill testified that she has always been the primary caretaker of Ryan and Kaitlyn. She makes sure that they do well in school, have routine chores, and have a sense of responsibility. Jill testified that she regularly attends parent-teacher conferences and the children's extracurricular activities.

Jill testified that she has a bachelor's degree in communication studies. She works for Omaha Builder's Exchange as their office manager. She testified that Omaha Builder's Exchange is managed by Master Builders of Iowa, whose corporate headquarters are in Des Moines, Iowa. Jill earns \$42,000 per year at her current job. Jill testified that until she gets an answer from the court regarding removal, it is not "worth my time or the job interviewer's time" to pursue anything in Iowa at this point. She testified, however, that she has no doubt that she could get a job in Iowa.

Jill testified that she owns a home in Omaha, but she and Luke have not purchased a home in Des Moines because it would not be financially responsible to have two mortgage payments. Jill testified that she has visited schools in the West Des Moines and Waukee school districts in Iowa--the areas where she and Luke are looking to live in--and that they offer the same opportunities as the Millard school district in Nebraska, where the children currently attend. Jill testified that Ryan is currently in the high learner's program in the Millard school district and that the Iowa schools have similar programs.

Jill testified that if she were allowed to move to Iowa, Brandon could keep his weekend visitation, but that he would necessarily lose his weeknight visits with Ryan and Kaitlyn. Jill testified that she was willing to give Brandon an extra week of visitation in the summer. She is also willing to take a reduction in child support to accommodate Brandon's gas and travel expenses.

Luke testified that he manages the West Des Moines Nutrishop location and that he was on track to make between \$55,000 and \$60,000 in 2011. He testified that the regional manager position will be opening up in the "not-to-distant" future and that he should get that job. Luke testified that as regional manager, he would make "substantially" more money, as the current regional manager makes "over six figures."

Luke testified that he lives in West Des Moines. He testified that he and Jill have not bought a home in Iowa yet, because they do not know if Jill will be allowed to move with the

children, and that therefore, it would not make sense to take on an extra mortgage. Luke testified that West Des Moines is “very similar” to West Omaha in that both have upscale housing, good schools, and low crime rates.

Brandon testified that he is married to Danielle Nyffeler. Danielle has three daughters who live with them, and he and Danielle also have a son, Carson Nyffeler. Brandon testified that he and Danielle have a six-bedroom, three-bathroom home in Omaha. He testified that Danielle’s two older daughters each have their own room, as does Carson. Brandon testified that when Ryan and Kaitlyn visit, they sleep in the same room as Danielle’s youngest daughter--a room that has two bunk beds. The sixth bedroom is currently a “toy room.” Brandon testified that if Jill moved to Iowa, he would want custody of Ryan and Kaitlyn. If Brandon got custody of Ryan and Kaitlyn, Carson would move “over to the TV room” and Ryan would get Carson’s room.

Brandon testified that the parenting plan in the original divorce was by agreement. He said that the parenting plan set forth the minimum time he was to have with Ryan and Kaitlyn--every other weekend, one evening per week, two 1-week visits in the summers, and specified holidays. Brandon testified that at one point, he was getting more time with the children, specifically two evenings per week, but that changed when Luke “got into the picture.” Brandon testified that he does not exercise his extended summer parenting time because he does not plan vacations.

Brandon testified that he tries to attend all of Ryan’s and Kaitlyn’s school functions and extracurricular activities. Brandon does not think that it is in the children’s best interests to move to Iowa, because Brandon would miss the children’s events and the children would lose time with their half brother, Carson. Brandon testified that a move to Iowa would also interfere with the children’s activities, because they would be in Nebraska every other weekend.

Brandon testified that Ryan and Kaitlyn have a close relationship with their paternal grandparents, who live in Omaha, and see them two times per month. Brandon also has a sister and a brother, each of whom has three children, who live in Omaha. Brandon testified that Ryan and Kaitlyn have a close relationship with their cousins.

The district court filed its order of modification on October 27, 2011. The district court found that Jill had a legitimate reason for leaving Nebraska. However, the district court found that it would not be in the children’s best interests to permit their removal to Iowa, because after viewing the evidence, the court found “little support” for any of the nine factors the court is to consider regarding the potential the move holds for enhancing the quality of life for the children and the custodial parent. The court stated that the children appeared to be healthy, happy, and thriving in their current situation; both parents are actively involved in all aspects of the children’s lives; the children are doing exceptionally well in school and are actively involved in extracurricular activities; the children have strong extended family ties in Omaha; the children have a strong and loving relationship with both parents; Jill is gainfully employed in Omaha and has not explored job opportunities in Iowa; and there is no certain place where the children will live in Iowa or attend school. Thus, the court denied Jill’s application for removal. The district court held that if Jill elects to remain in Omaha, she will retain custody of the children and Brandon’s counterclaim to modify will be denied. However, in the event Jill elects to leave the jurisdiction, the court held that Brandon’s counterclaim to modify custody shall be granted and

Brandon shall be granted custody of the children subject to Jill's rights of parenting time. Jill now appeals.

III. ASSIGNMENT OF ERROR

Jill alleges that the trial court erred in finding that it was not in the best interests of the minor children to permit their removal to Iowa.

IV. STANDARD OF REVIEW

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Rosloniec v. Rosloniec*, 18 Neb. App. 1, 773 N.W.2d 174 (2009).

V. ANALYSIS

The Nebraska Supreme Court in *Farnsworth v. Farnsworth*, 257 Neb. 242, 249, 597 N.W.2d 592, 598 (1999), stated:

To prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. . . . After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. . . . Of course, whether a proposed move is in the best interests of the child is the paramount consideration.

1. LEGITIMATE REASON TO LEAVE STATE

Although Brandon argues in his brief that Jill does not have a legitimate reason for leaving the state, he did not file a cross-appeal regarding such issue. Regardless, we find that the trial court did not abuse its discretion in finding that Jill has established a legitimate reason for removal to Iowa. Jill wanted to move to Iowa because she married a man who lives and works in Iowa. Jill married Luke on August 20, 2010. Luke manages a Nutrishop in West Des Moines. The Nebraska Supreme Court has said that "a move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal." *Vogel v. Vogel*, 262 Neb. 1030, 1042, 637 N.W.2d 611, 622 (2002). After our de novo review, we agree with the trial court that Jill has established a legitimate reason for removal to Iowa. We now turn to the children's best interests.

2. CHILD'S BEST INTERESTS

In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). See, also, *Farnsworth v. Farnsworth*, *supra* (setting forth definitive "roadmap" for analysis of such cases).

(a) Each Parent's Motives

The record is convincing that both parents are acting in good faith. Jill wants to move to Iowa to live with her new husband. Brandon does not want Jill to move Ryan and Kaitlyn to Iowa because the move would affect the parenting time that he has with the children. This factor is essentially neutral.

(b) Quality of Life

The *Farnsworth* court set forth a number of factors to assist trial courts in assessing whether the proposed move will enhance the quality of life for the child and the custodial parent. Factors to be considered include (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

(i) *Emotional, Physical, and Developmental Needs*

In the instant case, there is no evidence that the emotional, physical, and developmental needs of Ryan and Kaitlyn will be better met in Iowa than in their present living arrangement in Omaha, given the indefiniteness of the housing and schooling in Iowa. This factor does not militate in favor of the move.

(ii) *Child's Preference*

The children's preference is a nonfactor in the instant case because neither child testified at trial.

(iii) *Enhancement of Income and Employment*

Jill earns \$42,000 per year at her job in Omaha. At the time of trial, she had not pursued employment in Iowa because it was not "worth her time" until she got an answer from the court regarding removal. Luke was on track to make between \$55,000 and \$60,000 in 2011. He testified that if he got the regional manager position, which the evidence indicates will soon be open, he would make "over six figures." While this is certainly an increase in income for Luke, if Jill does not get a job in Iowa, their household income would remain the same. Although Jill testified that she has no doubt that she could get a job in Iowa, she has not presented evidence of what her income might be or where she might become readily employed. Therefore, on this record, we cannot say that this factor favors the move.

(iv) Housing and Living Conditions

Jill merely testified that she owns a home in Omaha, without elaborating as to details. She did not present any evidence as to where the children would live in Iowa other than that they would live in either West Des Moines or the small town west of Des Moines, Waukee. Therefore, we have no way of evaluating whether or not the children's housing and living conditions in Iowa would be suitable, let alone superior to either their present home in Omaha or the living arrangement that Brandon would provide if he were to have custody. Therefore, this factor does not weigh in favor of the move.

(v) Educational Advantages

Jill testified that she has visited schools in the West Des Moines and Waukee school districts--the areas where she and Luke are looking to live in--and that they offer the same opportunities as the Millard school district, where the children currently attend. Jill testified that Ryan is currently in the high learner's program in the Millard school district and that the Iowa schools have similar programs. Both children do exceptionally well in school, and Brandon admitted that he saw no reason that such performance would not continue if they lived in Iowa. Therefore, this factor does not prevent the move, but the evidence does little to carry Jill's burden to prove that the move is in the children's best interests, given the obvious uncertainty about where the children would actually attend school, as pointed out by the trial court.

*(vi) Quality of Relationship Between
Child and Parents*

Both Ryan and Kaitlyn appear to have a quality relationship with both Jill and Brandon. Jill and Brandon both love the children, are involved with them and their activities, and had no complaints about the other person's parenting skills. This factor does not prevent or favor the move.

(vii) Ties to Community and Extended Family

Jill, and by extension Ryan and Kaitlyn, has no relatives in Iowa. However, the children have numerous relatives in Nebraska, specifically in the Omaha area. Both sets of grandparents live in the Omaha area. Brandon has a sister and a brother, each of whom has three children, who live in Omaha. Brandon testified that Ryan and Kaitlyn have a close relationship with their cousins. Brandon remarried and has a son, Carson, born in March 2010, from his second marriage, and three stepdaughters. The evidence is that both Ryan and Kaitlyn are very fond of their younger half brother and that Kaitlyn is particularly close to her stepsister who is approximately her age. Ryan and Kaitlyn are presently involved in activities in Omaha, including at school and church. We must conclude that this factor weighs against removal.

(viii) Hostilities Between Parents

The potential for antagonizing hostilities between the parents exists whether the move is allowed or denied. Therefore, this factor does not prevent or favor the move.

(c) Impact on Noncustodial Parent's Visitation

“[T]his consideration focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship.” *Farnsworth v. Farnsworth*, 257 Neb. 242, 251, 597 N.W.2d 592, 599 (1999). And “[w]hen looking at this consideration, courts typically view it in the light of the potential to establish and maintain a reasonable visitation schedule.” *Id.* The *Farnsworth* court noted that the frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining reasonableness, citing *In re Marriage of Herkert*, 245 Ill. App. 3d 1068, 615 N.E.2d 833, 186 Ill. Dec. 29 (1993). In *Farnsworth*, the court noted that while a move from Omaha to Denver, Colorado, would necessarily lessen the frequency of the noncustodial parent's visits with the child, the distance between the two cities was not such as would prevent the noncustodial parent from seeing his child on a regular basis.

It seems inherent in any removal case that the noncustodial parent's visitation will be negatively affected by such things as lengthy car trips, the need for air travel, reduced frequency of visits, and increased expense associated with visitation, and perhaps all of such things. However, we suggest that because these inherent adverse effects on visitation are likely present in any removal case, the opinion emphasizes whether a reasonable visitation schedule can be established and maintained. Thus, the question moves away from simply whether there is an adverse impact on visitation by removal, and becomes more nuanced--whether frequency, total days, distance, and expense after removal prevent a reasonable visitation schedule.

Brandon's parenting time will not be much different if the children live in Iowa or Nebraska. Pursuant to the divorce decree, Brandon's minimum parenting time is every other weekend, one evening per week, two 1-week visits during the summer, and specified holidays. If Jill were allowed to move to Iowa, Brandon would necessarily lose his weeknight visit, but Jill has agreed to give Brandon an extra week of visitation during the summer. The evidence is clear that it is a 2-hour drive between Omaha and Des Moines, considerably shorter than the Omaha/Denver commute that was discussed in *Farnsworth*. Accordingly, Brandon would be allowed to maintain reasonable visitation with the children. Therefore, viewing this factor in that light, we must conclude that it does not prevent the removal of Ryan and Kaitlyn to Iowa.

3. SUMMARY

As said earlier, the evidence establishes a legitimate reason for the move to Iowa. However, we previously summarized the trial judge's reasoning for denying permission to move the children, and after our review of the record, we must agree with the trial judge's reasoning. The fact is that Jill has the burden of proof to show that the move is in the best interests of the children, and the record viewed as a whole shows that she did not carry that burden. Therefore, the trial judge did not abuse his discretion in denying her removal request. In so concluding, we are, of course, mindful that the trial judge had the opportunity to observe the witnesses at trial, an important consideration.

VI. CONCLUSION

For the reasons stated above, we find that Jill had a legitimate reason for wanting to move to Iowa. However, we find that the district court did not abuse its discretion in finding that

removal was not in the children's best interests. Therefore, we affirm the decision of the district court in all respects.

AFFIRMED.